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In The

Supreme Court of the United States

October Term, 1990

ILLINOIS STATE LABOR RELATIONS BOARD, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, AND ILLINOIS DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

ILLINOIS NURSES ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, First Judicial District

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

The Petitioners respectfully submit this supplemental brief to call to the attention of this Court the advisory opinion issued by the National Labor Relations Board ("NLRB") in *Correctional Medical Systems, Inc. and Illinois Nurses Association and Illinois State Labor Relations Board (Petitioner)*, 299 NLRB No. 95 (NLRB Case No. AO-278).*

* The Petitioners informed this Court in their petition for certiorari that the Illinois State Labor Relations Board had

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The NLRB issued its advisory opinion on August 31, 1990, one day after Petitioners filed their petition for certiorari. The opinion is set out in full in the appendix hereto.

As set forth in the petition for certiorari, the Illinois State Labor Relations Board ("ISLRB") took the extraordinary step of seeking an advisory opinion from the NLRB because it was concerned that the National Labor Relations Act ("NLRA") preempted it from exercising jurisdiction over the labor relations matter here in issue, as ordered by the Illinois Appellate Court, First Judicial District. *Illinois Nurses Ass'n v. Illinois State Labor Relations Board*, 196 Ill. App. 3d 576, 554 N.E.2d 404 (1st Dist. 1990) (Cert. Petition, p. App. 3).

The NLRB's advisory opinion confirms the ISLRB's concerns. The NLRB has found that (1) Correctional Medical Systems, Inc. ("Systems") is an "employer" within the meaning of section 2(2) of the NLRA, 29 U.S.C. § 152(2); (2) Systems maintains sufficient control over the nurses it employees at Shawnee Correctional Center to engage in meaningful collective bargaining; and (3) the assertion of jurisdiction by the NLRB would effectuate the purposes and policies of the NLRA. (Supp. Brief, p. App. 12) The NLRB concluded on the basis of these

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petitioned the NLRB for an advisory opinion concerning the NLRB's jurisdiction over the labor relations matter at issue in this case. (Cert. Petition at 8, 10 n. 4, 13) Petitioners referenced this then-pending matter as *Illinois Departments of Central Management Services and Corrections*, NLRB Case No. AO-278.

findings that it would assert jurisdiction over the matter here in issue. (Supp. Brief, p. App. 13)

The NLRB's declaration as to the existence of its jurisdiction establishes that the matter here in issue is more than just "arguably subject to § 7 or § 8 of the [NLRA]." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). This matter clearly lies within the exclusive jurisdiction of the NLRB. The ISLRB is, therefore, federally preempted from adjudicating this dispute as ordered by the State appellate court. *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 391 (1986).

CONCLUSION

For these reasons, and for all of the reasons previously set forth, the petition for certiorari should be granted.

Respectfully submitted,

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September 17, 1990

299 NLRB No. 95 D–1442
Vienna, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CORRECTIONAL MEDICAL SYSTEMS, INC.

and

ILLINOIS NURSES ASSOCIATION

and Case AO–278

ILLINOIS STATE LABOR RELATIONS BOARD
Petitioner

ADVISORY OPINION

Pursuant to Section 102.98(b) of the Board's Rules and Regulations, on June 25, 1990, the Illinois State Labor Relations Board (ISLRB) filed a petition for an advisory opinion as to whether the Board would assert jurisdiction over Correctional Medical Systems, Inc. (the Company). In pertinent part, the petition alleges that an unfair labor practice proceeding involving the Company (Case No. S–CA–100) is currently pending before the ISLRB;[1] that the rights and/or obligations of the parties to that proceeding turn on whether the Board would assert jurisdiction over the Company; and that this jurisdictional issue can be most expeditiously resolved through the Board's

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[1] The petition indicates that the unfair labor practice charge (alleging a refusal to bargain) was actually filed by the Union against the State of Illinois, Departments of Central Management Services and Corrections (DOC), and that the Company subsequently intervened. Aside from notifying the Board that it "concurs in the Petition for Advisory Opinion," DOC has not participated in the instant proceeding.

advisory opinion procedures. The Company, the Union, and the American Federation of State, County, and Municipal Employees, Council 31, AFL–CIO, as amicus curiae,[2] submitted statements responding to the ISLRB's petition.

Section 102.98(b) of the Board's Rules and Regulations provides that any State or territorial agency or court may petition the Board for an advisory opinion on whether it would decline to assert jurisdiction over parties then before the agency or court either (1) on the basis of its current standards, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. Here, the petition was filed by the ISLRB and specifically requests an opinion on whether the Company is within the jurisdiction of the NLRA.[3] Further, as fully discussed below, the ISLRB has already conducted a hearing and set forth relevant factual findings concerning the jurisdictional issue, and these factual findings have been upheld by the Illinois Appellate Court.[4] Accordingly, we find that the petition was

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[2] No party objects to AFSCME Council 31's participation as amicus curiae in this proceeding and such participation is granted.

[3] It is undisputed that the Company satisfies the Board's current commerce standards for asserting jurisdiction.

[4] Although the Union insists that we review afresh the hearing record if we decide to entertain the petition, we find that this would serve no useful purpose. Both the ISLRB and the Illinois Appellate Court have reviewed the record in the state proceeding, and both have reached essentially the same factual findings. For us to now review the record de novo and issue independent or contrary factual findings in this proceeding would simply muddy the waters – a result which both

(Continued on following page)

properly filed and that the jurisdictional issue raised may properly be addressed through the Board's advisory opinion procedures.[5]

I. The Relevant Facts

The ISLRB's decision issued in July 1988, on exceptions to the hearing officer's recommended opinion and order.[6] As noted by the Illinois Appellate Court on appeal,[7] the factual findings of the hearing officer and the ISLRB were for the most part similar, except that the hearing officer's findings were more comprehensive. The court summarized the relevant facts as follows:

> It is undisputed that [the Union] is the exclusive bargaining representative for nurses employed by the State, including nurses employed by the State to work at its correctional centers. In 1985, DOC entered into a non-bid contract with [the Company], a private corporation licensed to do business in Illinois and based in St. Louis, Missouri. [The Company],

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amicus and the Union itself strenuously argue we should avoid. For the purposes of this advisory opinion proceeding, therefore, we adopt the factual findings in the state proceeding as our own.

[5] The parties have not advised us, nor are we aware, of any unfair labor practice or representation proceedings involving the parties currently pending before the Board or its Regional Office.

[6] *State of Illinois, Departments of Central Management Services and Corrections*, 4 PERI para. 2034 (IL SLRB 1988).

[7] *Illinois Nurses Assn. v. Illinois State Labor Relations Board*, 196 Ill.App.3d 576, 554 N.E.2d 404 (Ill.App.Ct. 1990).

described in the contract as an independent contractor, has contracts to provide health services to correctional facilities in 16 states, including contracts with nine Illinois correctional facilities. Between April 1985 and June 1986, [the Company] was compensated on a cost-plus plan and provided all health care staff at [the Shawnee Correctional Center, a state facility in Vienna, Illinois], except for the health Care Unit Administrator, who was a DOC employee. (Since July 1987, this position has been staffed by a [company] employee.) Included among [company] staff are doctors, nurses, a dentist, psychiatrist and psychologist, a pharmacist, technicians, and clerical staff. Since July 1986, the contracts have provided that [the Company] is to be compensated on the basis of the number of inmates at Shawnee. Quarterly performance level adjustments may be made, as determined by DOC and [the Company] and approved by the Warden, if there are any deficiencies in the agreed-upon staffing level. All health equipment costing over $100 is owned by the State.

[The Company's] staff is required to represent DOC with local groups. [The Company] solicits, interviews, and hires the nurses. DOC has the right to approve the "initial and continued employment" of nurses and sets the minimum qualifications for them, *e.g.*, Illinois license, one-year experience, CPR certification with correctional nursing experience preferred. The contract also states certain details that the interviewer should focus on when questioning job applicants. Prior to starting work, each person hired by [the Company] must pass a DOC background check (for security purposes). The final hiring selection is subject to DOC's approval. (The [ISLRB] found that DOC did not

exercise this right but rather limited its involvement to overseeing security and professional licensing matters.)

The contract also gives DOC complete discretion to remove a nurse from Shawnee, although only [the Company] can terminate a staff member. If [the Company] does not remove the nurse from Shawnee at DOC's request, DOC can lock her out. In one case, [the Company] terminated a nurse after DOC conducted an investigation which resulted in the assistant warden requesting her termination. Nurses' personnel files must be kept at Shawnee; [the Company] keeps duplicate files in its St. Louis office.

DOC sets the minimum staffing and scheduling requirements, and specifies how many hours a week a nurse may work, approves all hours that have been worked, and the length of the meal period. DOC provides the meals on site (for security reasons). Requests for all absences and overtime must be processed according to DOC requirements and procedures. DOC requires that all nurses must be evaluated annually in accordance with applicable state rules. Although, in fact, [the Company] conducts the evaluations, DOC must verify them. DOC must approve all hours worked which must be kept on DOC timekeeping forms. DOC requires all nurses to wear white uniforms and its identification badges which identify them as contractual employees. New nurses must attend 40 hours of orientation given [sic] by DOC at the State of Illinois Training Academy in Springfield. Further, each year DOC requires all nurses to complete 40 hours of in-service training.

The contract states that nurses must comply with Administrative Regulations and Administrative Directives, as well as policies and procedures of DOC and Shawnee. The directives for

the health care unit were written by DOC Medical Director and approved by the Director of Corrections. From these directives, each institution develops its own Institutional Directives; at Shawnee, these were mostly written by a DOC employee and approved by the warden. Pursuant to these directives, the contract provides for a Health Care Services Review Committee which is made up of both DOC and [company] administrators. Its function is to review inmate complaints, infirmary care, mental health responses, health records, etc. Meeting minutes are given to the warden. The Shawnee nurse's manual "is the how-to guide for organizing, planning and administering" health care, and incorporates applicable directives in addition to other details as to how the work is to be performed. The manual was written by a [Company] employee, but after DOC's approval, became the property of DOC.

Nurses are hired as [Company] employees. [The Company] determines their pay rate and issues the checks from St. Louis. It provides all benefits, *e.g.* health insurance, retirement plan. Vacation time, sick leave, etc. are established by [the Company]. Only [the Company] can transfer, promote, discipline, and terminate a nurse. [The Company] pays unemployment and workers' compensation insurance premiums and all required employee taxes. However, the contract provides that [the Company] has a right to "seek representation and indemnification from the Attorney General's Office."

554 N.E.2d at 406 – 407. On June 1, 1990, the Illinois Supreme Court denied leave to appeal the decision of the

appellate court,[8] and thus the foregoing factual findings are appropriately considered final.

II. The Positions of the Parties

Based on its factual findings, the ISLRB concluded that it lacked jurisdiction over the Shawnee matter. Applying a "degree of control" test, the ISLRB found that the Company rather than the State was the employer of the nurses at Shawnee, and that the Company was not the State's "agent" within the meaning of the Illinois Public Labor Relations Act. Both the ISLRB and the Company take essentially the same position here, arguing that the State lacks sufficient control over the Shawnee nurses' primary terms and conditions of employment to preclude meaningful bargaining by the Company, and that the Board and not the ISLRB therefore has jurisdiction under the standards set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986).

The Union and amicus, on the other hand, take the position that the Board should decline to even entertain the ISLRB's petition for advisory opinion. Noting that the Illinois Appellate Court ultimately reversed the ISLRB's conclusions and held that the Company was the State's agent as a matter of law (because it was performing statutorily and constitutionally mandated government

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[8] 132 Ill.2d 545, 555 N.E.2d 376 (Ill.S.Ct. 1990). On July 19, 1990, the Illinois Supreme Court further denied leave to file a motion for reconsideration of the order denying leave to appeal.

duties, and because the State, while permitting the Company to control the nurses, retained the right and/or duty to control), the Union and amicus argue that the Board should defer to the court's ruling and dismiss the petition. Alternatively, the Union argues that the Board should find that the Company is exempt from NLRA jurisdiction.

III. Analysis and Conclusions

Although the Board has traditionally given careful consideration to state law declarations and interpretations, in the final analysis it is Federal rather than state law which governs whether an employer is within the Board's jurisdiction.[9] Further, while the Board has in certain circumstances declined to issue an advisory opinion in deference to state proceedings,[10] this is not such a circumstance. Accordingly, contrary to the urgings of the Union and amicus, we decline to defer to the Illinois Appellate Court's ruling.[11]

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[9] See *New York Institute for the Blind*, 254 NLRB 664, 665 and 667 (1981) (citing *NLRB v. Natural Gas Utilities District of Hawkins County*, 402 U.S. 600 (1971)).

[10] See *SHA Realty*, 299 NLRB No. 41 (July 31, 1990), and *Box Tree Restaurant*, 235 NLRB 926 (1978), and cases cited there (declining to issue an advisory opinion where the State had conducted a representation election within the previous year and thus it was clear the the Board itself would not, at that time, entertain a representation petition among the same employees).

[11] As indicated earlier, however, we will defer to the court's underlying factual findings for the purposes of this proceeding.

As for the substantive issue presented, we find, in agreement with the ISLRB and the Company, that we would assert jurisdiction over the Company. The Company is clearly not an exempt "political subdivision" under Section 2(2) of the Act. That exemption has historically been interpreted to include only those entities that are either (1) created by the State, so as to constitute departments or administrative arms of the Government, or (2) administered by individuals who are responsible to public officials or to the general electorate.[12] As indicated by the court, the Company here is a private corporation doing business in several different States, and in fact is described as an independent contractor in its contract with DOC.

Nor is the Company exempt from jurisdiction under the principles of *Res-Care* and *Long Stretch Youth Home*, supra. In those cases, both of which issued the same day, the Board reaffirmed the holding of *National Transportation Service*, 240 NLRB 565 (1979), and rejected the so-called "intimate connection" test under which jurisdiction was withheld if the private employer performed functions that were intimately related to allegedly traditional government functions of the exempt entity. The Board held that the proper focus was rather on the extent of control retained by the employer over essential terms and conditions of employment and on the degree of control exercised by the exempt entity over the employer's labor relations policies; in short, on whether the employer retained "sufficient control over the employment conditions of its employees to engage in

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[12] See *Hawkins County*, supra.

meaningful collective bargaining." *Res-Care*, 280 NLRB at 674; *Long Stretch Youth Home*, 280 NLRB at 681 – 682. Applying this test, the Board in *Res-Care* declined jurisdiction because the exempt entity in that case approved the initial wages, wage ranges, and benefits contained in the employer's proposed operating budget, and also retained the discretion, pursuant to the contractual cost-plus-fixed-fee compensation system, to approve or disapprove any subsequent changes in those terms. In contrast, the Board in *Long Stretch Youth Home* asserted jurisdiction because, although the per-resident compensation system in that case effectively imposed a ceiling on the employer's total operating budget, there were no specific limits on employee compensation, i.e., the employer was free to pay either more or less than what the exempt entity suggested in its cost guidelines.

Based on the facts as found in the state proceeding, we find the instant case more like *Long Stretch Youth Home* than *Res-Care*. Thus, although the Company used to be compensated on a cost-plus basis, it is now compensated on a per-inmate basis by DOC. Moreover, as stated by the court, the Company determines the nurses' pay rate and provides all benefits, including health insurance.[13] As in

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[13] The ISLRB's complete findings concerning employee compensation were as follows:

> The record reveals that the Company has sole and complete control over the wages and fringe benefits received by the nursing staff. Salary ranges are set by the Company for each job classification based on surveys that it alone conducts. Annual increases are

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Long Stretch Youth Home, therefore, it is clear that the Company retains extensive if not exclusive control over employee compensation.[14]

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> also determined by the Company based on job performance evaluations performed by Company employees. The State has no authority to recommend or review wage rates set by the Company. Paychecks are issued by the Company and it pays all unemployment and workers' compensation insurance, withholds income taxes and pays the employer's portion of social security security tax. The Company provides the staff with medical, dental and life insurance, a retirement plan, vacations and funeral and sick leave. The State has no input in establishing these benefits.

The hearing officer's findings were essentially the same as the ISLRB's:

> The nurses are paid pursuant to the Company's pay schedule, and their pay checks are on Company checks issued out of St. Louis. The nurses receive the same benefit package that the Company provides its employees (health and dental plan, life insurance, and retirement plan), and their right to receive paid holidays and vacations, sick leave, and leaves of absence are governed by the Company's rules. . . . In addition, the Company is responsible for paying unemployment and workers' compensation insurance for the nurses and withholds their state and federal taxes and remits the monies to the appropriate federal and state agencies and pays the employer's portion for their social security tax.

[14] It is this fact which primarily distinguishes this case from *Correctional Medical Systems,* 289 NLRB No. 103 (July 13, 1988), a case in which the Board declined to assert jurisdiction

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As outlined by the court, DOC does exercise a significant degree of control over certain personnel policies such as hiring selection, staffing, scheduling, and uniforms. However, we find that this operational control would not preclude meaningful bargaining. As indicated by the court, the control is exercised largely for security reasons, and although DOC could go so far as to remove a nurse from Shawnee, only the Company could actually terminate the nurse's employment. The Board has asserted jurisdiction under similar circumstances in several previous cases following *Res-Care* and *Long Stretch Youth Home,*[15] and we accordingly would do likewise here.

In sum, we find that the Company is an employer within the meaning of Section 2(2) of the Act; that the Company retains sufficient control over the Shawnee nurses' terms and conditions of employment to engage in meaningful collective bargaining; and that it would therefore effectuate the purposes and policies of the Act to assert jurisdiction over the Company.

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over the Company with respect to its operations at an Iowa correctional facility. In that case, the contract between the Company and the Iowa State Penitentiary incorporated a civil rights consent decree which effectively limited the Company's discretion over wages and benefits, thus making that case more like *Res-Care.*

[15] See *Koba Associates,* 289 NLRB No. 33 (June 28, 1988); *Old Dominion Security,* 289 NLRB No. 18 (June 14, 1988); *Dynaelectron Corp.,* 286 NLRB 302 (1987); and *Rustman Bus Co.,* 282 NLRB 152 (1986).

Accordingly, the parties are advised that, based on the facts as found in the state proceeding, the Board would assert jurisdiction over the Company.

Dated, Washington, D.C. August 31, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD